

Decision No. R04-0490

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-120CP-EXTENSION

IN THE MATTER OF THE APPLICATION OF VAIL SUMMIT RESORTS, INC.,
D/B/A KEYSTONE RESORT, INC., POST OFFICE BOX 38 (K-42), KEYSTONE,
COLORADO 80435, FOR A CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY AUTHORIZING AN EXTENSION OF OPERATIONS UNDER
PUC CERTIFICATE NO. 20195.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
GRANTING MOTION TO
STRIKE INTERVENTION;
VACATING HEARING DATE; AND
GRANTING APPLICATION UNDER
MODIFIED PROCEDURE**

Mailed Date: May 11, 2004

I. STATEMENT

1. The captioned application of Vail Summit Resorts, Inc., doing business as Keystone Resort, Inc. (Keystone), was filed with the Colorado Public Utilities Commission (Commission) on March 16, 2004, and was published in the Commission's "Notice of Applications Filed" on March 22, 2004. It is currently scheduled for hearing on June 1, 2004.

2. By this application, Keystone seeks authority to extend common carrier operations under its Certificate of Public Convenience and Necessity (CPCN) No. 20195 as follows:

Transportation of

passengers and their baggage, in scheduled and charter service,

between all points located within a three-mile radius of the intersection of U.S. Highway 6 and West Keystone Road, in Summit County, Colorado

3. On April 21, 2004, Craig S. Suwinski (Suwinski) filed a pleading entitled “Requested Permissive Intervention” (Request to Intervene). Through this pleading, Suwinski requests that he be allowed to intervene in this matter on a permissive basis.

4. On April 28, 2004, Keystone filed a Motion to Strike Applicant’s Request for Permissive Intervention (Motion to Strike) and a Motion for an Extension of Time to File and Serve its List of Witnesses and Copies of Exhibits (Motion for Extension). The Motion to Strike requests that the Request to Intervene be stricken. The Motion for Extension requests an enlargement of time for Keystone to file its witness/exhibits list pending a decision on the Motion to Strike.

5. On May 7, 2004, Suwinski filed his Response to the Motion to Strike along with a Brief in support thereof.

6. In accordance with § 40-6-109, C.R.S., the undersigned now transmits to the Commission the record in this proceeding along with a written recommended decision.

II. FINDINGS AND CONCLUSIONS

A. **Motion to Strike Intervention; Request for Permissive Intervention**

7. Rule 64(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1-22(b), governs requests for permissive intervention in Commission proceedings. Under that rule, permissive intervenor status may be granted to "...one who has a substantial interest in the subject matter of a proceeding." *See also*, § 40-6-109, C.R.S. (Commission may allow intervention to persons "interested in or affected by" a Commission order).

8. Suwinski does not hold motor carrier operating authority that conflicts with the authority sought by Keystone. Therefore, he does not qualify as an "intervenor of right" pursuant to 4 CCR 723-65. Rather, he seeks permissive intervenor status for the purpose of challenging Keystone's "fitness" to hold the authority sought. In this regard, Suwinski alleges that Keystone has provided, or is providing, for-hire transportation services over the public highways of this state in intrastate commerce in violation of various provisions of public utilities law.

9. Suwinski contends that he should be allowed to intervene since he "...falls within the category of the public that will be subject to Applicant's permitted activities and is concerned that Applicant fully complies with PUC regulations." *See*, Request to Intervene at page 3. He states that his request for permissive intervention would be withdrawn if Keystone would agree to "...fully refund all previously collected revenue for non-permitted services to the original payors." *See*, Request to Intervene at page 4.

10. In the Motion to Strike, Keystone contends that since Suwinski does not hold authority in conflict with its application he does not have a substantial interest in the application

such that he will be affected by any order issued in this docket. It compares his Request to Intervene to intervention requests made by potential utility customers in applications by utilities seeking to expand their service. Citing Commission Decision No. C04-0293, Keystone submits that the Commission typically denies such intervention requests. It also points out that Suwinski's allegations may be more appropriately brought within the context of informal or formal complaint proceedings under 4 CCR 723-1-61.

11. In applications of this type the Commission and its administrative law judges have traditionally held that the lack of overlapping or duplicative operating rights deprives a party of sufficient legal standing to intervene in such proceedings, either as a matter of right or permissively. *See*, Decision Nos. C97-390 (lack of authority in conflict deprives party from being interested in or affected by any order issued by the Commission in the subject docket); C03-0763 (lack of authority in conflict with temporary authority application deprives party of standing to intervene, either as of right or permissively); R03-0898; R00-98; R99-964; C99-650; and R99-523. Such a holding is especially appropriate where, as here, the remedies sought by the party seeking to intervene cannot legally be granted within the context of the proceeding for which intervenor status is sought, but can be pursued in other proceedings.

12. By this application, Keystone seeks an extension of its CPCN pursuant to § 40-10-105, C.R.S. Within the context of this proceeding the Commission may, therefore, either grant or deny the application, in whole or in part. It has no ability to grant reparations to

Suwinski (or those similarly situated) or to assess civil penalties against Keystone even if his allegations concerning Keystone's unlawful behavior are proven to be true.¹

13. In this regard, it is observed that the pursuit of a reparations remedy may properly be brought by Suwinski or other appropriate parties under § 40-6-119, C.R.S. (when complaint is made to the Commission it may order utility to pay reparations for excessive charges assessed for its services) and § 40-6-108, C.R.S. (complaint may be made with the Commission by any person setting forth any act or thing done by a utility in violation of any provision of law).² Similarly, a civil penalty assessment proceeding may be brought against Keystone by the Commission under § 40-7-116, C.R.S., on the basis of the allegations raised by Suwinski. Appropriate civil penalties may be imposed against Keystone if the Commission sustains its burden of proof with regard to such allegations.

14. Finally, the Commission is reluctant to allow intervention on a permissive basis when doing so would unduly broaden the issues involved in a proceeding. No party, other than Suwinski, has sought to intervene in this matter. Allowing Suwinski's intervention would, therefore, significantly broaden the issues to be dealt with in this proceeding by converting it from an uncontested matter to a fully contested one.

15. For these reasons, the Motion to Strike will be granted and the Request to Intervene will be denied.

¹ These appear to be the remedies sought by Suwinski. See, Request to Intervene at pages 3 and 4; Response at page 5; and Brief at pages 6 and 7. It appears that he does not oppose granting the application, at least temporarily, in some form. See, Request to Intervene at page 4 (current services should be continued on a temporary basis) and Response at page 5 (Intervenor would support Keystone being granted temporary authority as a contract carrier).

² Suwinski correctly observes in the Response that the Commission's Staff may seek to intervene in such a complaint proceeding under 4 CCR 723-1-72(c)(2).

B. Disposition of Application Under Modified Procedure

16. Granting the Motion to Strike and denying the Request to Intervene renders the application uncontested. Therefore, it is eligible for processing under modified procedure pursuant to § 40-6-109(5), C.R.S., and Rule 24 of the Commission's **Rules of Practice and Procedure**, 4 CCR 723-1-24, without a formal hearing.

17. The verified application submitted by Keystone indicates that it is familiar with the Commission's Rules, Regulations and Civil Penalties Governing Common Carriers of Passengers by Motor Vehicle for Hire and that it agrees to be bound by the same. The application and the attachments thereto also indicate that Keystone has sufficient equipment with which to render the proposed service and is financially fit to conduct operations under the authority requested. Therefore, it is fit, financially and otherwise, to provide the proposed service.

18. The letters of support appended to the application establish that the service proposed by Keystone is required by the public convenience and necessity and will not result in "destructive competition" to other common carriers serving the same geographic area encompassed by the application.

19. Resolution of this matter pursuant to § 40-6-109(5), C.R.S., and 4 CCR 723-1-24 renders the Motion for Extension moot. As a result, it will be denied for that reason.

III. ORDER**A. The Commission Orders That:**

1. The Motion to Strike Applicant's Request for Permissive Intervention, filed in this proceeding by Vail Summit Resorts, Inc., doing business as Keystone Resort, Inc., is granted.

2. The Requested Permissive Intervention filed in this proceeding by Craig S. Suwinski, is denied.

3. The Motion for an Extension of Time to File and Serve its List of Witnesses and Copies of Exhibits filed in this proceeding by Vail Summit Resorts, Inc., doing business as Keystone Resort, Inc., is denied, as moot.

4. Docket No. 04A-120CP-Extension, being an application of Vail Summit Resorts, Inc., doing business as Keystone Resort, Inc., to extend common carrier operations under Certificate of Public Convenience and Necessity PUC No. 20195, is granted.

5. The hearing of this matter, currently scheduled for June 1, 2004, is vacated.

6. Vail Summit Resorts, Inc., doing business as Keystone Resort, Inc., Certificate of Public Convenience and Necessity PUC No. 20195, is hereby amended to read as follows:

I. Transportation of

passengers and their baggage, on schedule,

between all points located within Keystone, County of Summit, State of Colorado, namely Sections 23, 24, 27, and 34, Township 5 South, Range 77 West of the 6th P.M., and Section 19, Township 5 South, Range 76 West of the 6th P.M., on the one hand, and, on the other hand, all points within a five-mile radius of the intersection of Quebec Street and Martin Luther King Parkway in Denver, Colorado.

II. Transportation of

passengers and their baggage, in charter service,

between all points in Keystone, County of Summit, State of Colorado, namely Sections 23, 24, 27, and 34, Township 5 South, Range 77 West of the 6th P.M., and Section 19, Township 5 South, Range 76 West of the 6th P.M., on the one hand, and Denver International Airport, on the other hand.

- III. Transportation of passengers and their baggage, in scheduled and charter service, between all points located within a three-mile radius of the intersection of U.S. Highway 6 and West Keystone Road, in Summit County, Colorado.

RESTRICTIONS:

- A. Item No. I is restricted to providing service only to points named in the carrier's published schedule; and
- B. Item No. I is restricted against providing service to or from Union Station or to or from the Fairmont Hotel both in Denver, Colorado.
7. Applicant shall cause to be filed with the Commission certificates of insurance as required by Commission rules. Applicant shall also file an appropriate tariff and pay the issuance fee and annual vehicle identification fee. Operations may not begin until these requirements have been met. If the Applicant does not comply with the requirements of this ordering paragraph within 60 days of the effective date of this Order, then the ordering paragraph granting authority to the Applicant shall be void. On good cause shown, the Commission may grant additional time for compliance.
8. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.
9. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.
- a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

10. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge